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In The
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PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

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On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF NEIL VIDMAR, BRIAN BORNSTEIN, KEVIN M. CLERMONT, STEPHEN DANIELS, THOMAS A. EATON, THEODORE EISENBERG, SOLOMON M. FULERO, MARC GALANTER, EDITH GREENE, VALERIE P. HANS, MICHAEL HEISE, IRWIN A. HOROWITZ, THOMAS H. KOENIG, MARGARET BULL KOVERA, STEPHAN LANDSMAN, ROBERT MACCOUN, NANCY S. MARDER, JOANNE MARTIN, JAMES T. RICHARDSON, JENNIFER K. ROBBENNOLT, MARY R. ROSE, MICHAEL L. RUSTAD, SUSETTE M. TALARICO, MARTIN T. WELLS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are university professors or scholars holding senior positions at independent research institutions. Each amicus has conducted or reviewed empirical research on juries, punitive damages, or both. The interest of the amici in this case is to provide the Court with an accurate summary of empirical research about jury behavior and competence relating to punitive damages. Short biographies of each amicus are provided in Appendix A.[1]

SUMMARY OF ARGUMENT

Critics of punitive damages have argued that civil jury punitive awards are haphazard and based on biases against large corporations, that the frequency of awards has increased, and that the amounts awarded have increased. They have also asserted that the ratio between punitive and compensatory damages is out of step with guidelines set by this Court, especially in cases involving very large punitive awards. Moreover, often implicitly and sometimes explicitly, critics argue that trial courts and appellate courts do not adequately exercise their powers to control inappropriate punitive awards.

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[1] Pursuant to this Court's Rule 37, amici state that blanket letters of consent from both parties have been filed with the Clerk of the Court, and pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to its preparation and submission. Amici are grateful to Duke University School of Law students Brian D. Hurley, Jennifer L. McGinnis, Matthew W. Wolfe, and Jennifer A. Zimbroff for their invaluable contributions to this brief.

Over the last twenty-five years researchers from government organizations, universities and prestigious research institutions have conducted empirical research bearing on these various claims. The studies overwhelmingly indicate that, contrary to the claims that these critics make, civil juries perform rationally and reasonably.

The research has found that: (1) juries award punitive damages infrequently; (2) punitive damages awards have not increased in frequency; (3) when adjustments are made for inflation the magnitude of such awards has not increased over the past several decades; (4) most awards are modest in size; (5) the overwhelming majority of awards show a rational proportionality between actual and potential harm caused by defendants; (6) the same proportionality relationship between compensatory and punitive damages exists in cases involving large punitive awards; (7) juries pay particular attention to the reprehensibility of defendants' conduct; (8) jury decision-making processes in punitive damages cases are similar to the decision-making processes used by judges in bench trials of such cases; (9) the amounts of punitive awards rendered by juries and judges are similar when adjustments are made for case types; (10) little evidence indicates that juries are biased against large businesses; (11) judges effectively exercise supervision over punitive damages in post-verdict motions or on appeal; and (12) in other instances post-verdict settlements reduce or abandon punitive awards without judicial intervention.

These empirical findings strongly undermine the Petitioner's premise that additional due process limits in

punitive damages cases are needed. Jury decision-making comports with the criteria that this Court has enunciated in *State Farm Mut. Auto Ins. Co. v. Campbell*[2] and other leading cases.

ARGUMENT

I. Juries Perform Rationally and According to Legal Principles When Assigning Punitive Damages.

This Court has outlined three criteria that should guide decision-making about punitive damages. *State Farm Mut. Auto Ins. Co. v. Campbell* states that "'[T]he most important indicium of the reasonableness of punitive damages is the degree of reprehensibility of the defendant's conduct.'"[3] Elaborating further, this Court said:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[4]

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[2] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

[3] *Id.* at 420 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

[4] *Id.*

The second criterion is the relationship between compensatory and punitive damages. Although there can be "no bright-line ratio," few awards exceeding a single digit ratio will satisfy due process.[5] The third criterion involves the relationship between the punitive damages and civil penalties authorized or imposed in comparable cases that might be subject to criminal penalties. This brief addresses only the first two criteria since the third criterion involves legal judgment beyond the purview of jury decisions.

Twenty-five years of empirical research lead to the conclusion that, with rare individual exceptions, jury behavior is consistent with this Court's criteria. Punitive damages are rendered in only a small percentage of cases, mostly for intentional torts and fraud; the frequency and amounts of punitive damage awards have not changed over the past several decades; punitive to compensatory ratios are typically modest; juries and trial judges decide punitives using similar criteria, putting especial emphasis on the reprehensibility of the defendant's behavior.

A. Juries Rarely Award Punitive Damages.

The "Civil Justice Survey of State Courts," a joint project of the U.S. Department of Justice's Bureau of Justice Statistics and the National Center for State Courts systematically collected data directly from clerks' offices in

[5] *State Farm*, 538 U.S. at 426. *See also Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (upholding a punitive damages award "more than 4 times the amount of compensatory damages [and] more than 200 times the out-of-pocket expenses of" the plaintiff).

forty-six state courts of general jurisdiction covering three periods: 1991-92, 1996, and 2001.[6] These data sets are representative of the seventy-five most populous counties in the United States. The Bureau of Justice Statistics findings lead to the estimate that punitive damages are awarded in less than one percent of all civil actions commenced during each of these three periods.[7] In 2001 juries awarded punitive damages in only 5.7 percent of tort and contract cases when the plaintiff prevailed at trial.[8]

Eaton et al. recently reviewed a number of databases to conclude that "for every 1000 tort claims filed, typically only 50 or more are resolved by trial, only 25 produce trial

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[6] Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties*, Bureau of Justice Statistics Special Report NCJ 154346 (July 1995) [hereinafter "Bureau of Justice Statistics July 1995"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties, 1996*, Bureau of Justice Statistics Bulletin, NCJ 173426 (Sept. 1999) [hereinafter "Bureau of Justice Statistics September 1999"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001*, NCJ 202803 (Apr. 2004) [hereinafter "Bureau of Justice Statistics April 2004"]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001*, NCJ 206240 (Nov. 2004) [hereinafter "Bureau of Justice Statistics November 2004"]; Bureau of Justice Statistics, U.S. Dept. Of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445 (Mar. 2005) [hereinafter "Bureau of Justice Statistics March 2005"].

[7] *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. Empirical Legal Stud. 263, 268 (2006) ("[A]pplying any realistic rate of filed cases reaching trial, less than 1 percent of civil actions formally commenced resulted in the awarding of punitive damages.").

[8] Bureau of Justice Statistics April 2004, *supra* note 7, at 3 tbl.2.

outcomes favorable to the plaintiff, and only 1.25 [of 1000] have a punitive damage award."[9]

In 1998 Professor Michael Rustad reviewed nine major empirical studies of punitive damage awards conducted up to that time.[10] The combined data from these studies reached as far back as 1960 and covered most geographical areas of the United States. The various studies were conducted by the United States General Accounting Office ("GAO"),[11] by prestigious, non-partisan research institutions (the American Bar Foundation;[12] the RAND Institute of Civil Justice ("RAND")),[13] by Professor William Landes and Judge Richard Posner,[14] and by

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[9] Thomas Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Stud. 344, 345 (2005).

[10] Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 15, 17–19 (1998).

[11] U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90, at 24, 29 (Sept. 1989) (Punitive damages were awarded in 23 of 305 cases decided in five states.) [hereinafter "GAO Report"].

[12] Stephen Daniels & Joanne Martin, *Civil Juries and the Politics of Reform* 214 (1995) ("[P]unitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards.").

[13] James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (1988) ("[P]unitive damages were not paid on any of the 2,198 closed cases."); Erik Moller, *Trends in Civil Jury Verdicts Since 1985*, 33 (1996) ("[P]unitive damages are awarded very rarely."); Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (1987) (Fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960–1984.).

[14] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, 304–07 (1987) ("[The] insignificance of punitive damages in our sample is evidence that they are not being routinely awarded.").

university-based academics.[15] Since that time additional studies have been conducted.[16]

Every one of the above studies of actual jury verdicts has concluded that punitive damages are rarely awarded.

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[15] Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 633–37 (1997) (summarizing studies on the decision to award punitive damages) [hereinafter "Eisenberg et al., *Predictability*"]; Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 745 (2002) [hereinafter "Eisenberg et al., *Juries, Judges, & Punitive Damages* 2002"]; Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 Just. Sys. J. 21 (1993); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 Rutgers L. Rev. 975, 981–92 (1995) (concluding that punitive damages are rarely awarded in medical malpractice cases) [hereinafter "Rustad & Koenig, *Reconceptualizing*"].

[16] For example, a 2000 Georgia study concluded that "punitive damages currently are not a significant factor in personal injury litigation in Georgia." Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049, 1094 (2000). A Florida study found that frequency of punitive damages awards to be "strikingly low." Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida:* In Terrorem *and in Reality*, 38 Harv. J. Legis. 487, 487 (2001). *See also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 31 (1990) (1,287 cases involved punitive awards out of the 25,627 civil jury verdicts studied.); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 Ohio St. L.J. 315, 388 (1999) (no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Neil Vidmar, *Medical Malpractice and the American Jury* 254 (1995) (two punitive awards in 1,300 North Carolina medical malpractice cases); Eisenberg et al., *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards, in Civil Juries and Civil Justice: Psychological and Legal Perspectives* (Brian Bornstein et al. eds., forthcoming 2007), *available at* http://ssrn.com/id=929565 ("Multiple studies establish that punitive damages are rarely awarded. . . .") [hereinafter "Eisenberg et al. 2007"].

These findings strongly indicate that juries are very selective in awarding punitive damages.

B. The Incidence of Punitive Damages Has Not Increased.

The most recent Bureau of Justice Statistics study showed that in 2001 plaintiffs received punitive damages in 5.6 percent of jury trials in which plaintiffs prevailed, compared to 6.1 percent in 1992. While this difference is not statistically significant, it is in a direction *opposite* to claims that punitive damages are increasing.[17] In contract cases the percentage of punitive awards declined from 12.9 percent in 1992 to 10.1 percent in 2001, a difference that is statistically significant.[18] The number of punitive damage awards for $1 million or more was 13.9 percent in 2001 versus 12.2 percent in 1992.[19] The small increase in the percent of million dollar awards was not statistically significant.

Strikingly, Rustad's review of earlier studies yielded a similar conclusion.[20] His research indicated that, with the exception of asbestos cases, punitive damages were in decline beginning at the end of the 1970s.[21]

In a recently completed study Eisenberg, Hans, and Wells investigated the relationship between punitive and

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[17] Bureau of Justice Statistics March 2005, *supra* note 6, at 8 tbl.9.

[18] *Id.*

[19] *Id.*

[20] Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Emprical Data*, 78 Iowa L. Rev. 1, 36–39 (1992).

[21] *Id.* at 37–38.

compensatory damages by combining the Bureau of Justice Statistics data for 1992, 1995, and 2001 with data on large awards collected by Hersch and Viscusi and with data on large awards collected by the *National Law Journal*.[22] Analyses showed no noticeable increase in either compensatory or punitive damages for any of the three sets of data.

In short, jury critics' claim that punitive damages are on the increase is not supported by hard data.

C. Punitive Damages Are Primarily Awarded in Cases Involving Intentional Torts and Fraud.

Empirical data consistently show that punitive damages are rare in product liability and medical malpractice cases. For example, the Bureau of Justice Statistics data show that in 2001, among the nation's seventy-five largest counties there were only three punitive damage awards out of a total of seventy product liability cases in which plaintiffs prevailed (two of the three cases involved asbestos) and fifteen awards out of 311 medical malpractice cases.[23] These findings are consistent with other studies.[24]

Rustad's review of empirical studies on punitive damage awards concluded that the biggest growth area for large punitive damages was not in personal injury, but in

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[22] Eisenberg et al. 2007, *supra* note 16.

[23] Bureau of Justice Statistics April 2004, *supra* note 6, at 6 tbl.7.

[24] *E.g.*, Rustad & Koenig, *Reconceptualizing*, *supra* note 15.

business and contract litigation involving economic harm resulting from opportunistic business practices.[25]

Vidmar and Rose's examination of punitive awards against businesses led them to conclude that:

> punitive damages against businesses all tended to involve allegations of either a knowing and active disregard for the law – e.g. illegal toxic dumping, allowing minors to have alcohol, falsely reporting inspections – or misconduct by people in senior positions – e.g., a ship's captain, a business owner, corporate executives. In short, these cases rarely involved businesses engaging in commonly accepted practices or those having taken normal precautions for safety.[26]

The Bureau of Justice Statistics data indicate that in 2001, punitive damages were most likely to be awarded in cases involving slander/libel, intentional torts and false arrest/imprisonment. In contract cases punitive damages were most likely to be awarded in partnership disputes, employment discrimination and fraud.[27]

D. Punitive Damages Tend to Be Modest and To Be Positively Correlated with Compensatory Damages.

In *BMW of N. Am., Inc. v. Gore*[28] and *State Farm Mut. Auto Ins. Co. v. Campbell*[29] this Court, while reluctant to

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[25] Rustad, *supra* note 10, at 37–39.

[26] Vidmar & Rose, *supra* note 16, at 499.

[27] Bureau of Justice Statistics April 2004, *supra* note 6, at 5. These figures include both jury and bench trials.

[28] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).

establish concrete constitutional limits, suggested that the ratio between punitive damages and the actual harm and potential harm to the plaintiff or non-parties should ordinarily not exceed a single digit.

The empirical findings show the damages awarded by juries and upheld by courts are in line with this Court's directives. The Bureau of Justice Statistics data for 2001 show that the median inflation-adjusted punitive award when plaintiffs prevailed was only $50,000, compared with $63,000 in 1992.[30]

In a study covering nine states, Daniels and Martin found that, in fifteen of twenty counties that had more than ten punitive verdicts, the median punitive award was below $40,000.[31]

In a sample of Florida cases involving both personal injury and business disputes covering the years from 1989 through 1998 Vidmar and Rose found that the median punitive award was only seventy percent of the compensatory award.[32]

Rustad's study of 355 product liability cases involving punitive damages over a twenty-five year period yielded a conclusion that the median ratio of punitive damages to

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[29] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003).

[30] Bureau of Justice Statistics March 2005, *supra* note 6, at 8 tbl.9.

[31] Steven Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 41–42 (1990).

[32] Vidmar & Rose, *supra* note 16, at 501 tbl.3.

compensatory damages awarded at trial was 1.67 to 1.[33] Compensatory damages were actually higher than punitive damages in fully thirty-six percent of the cases.[34] Rustad further concluded that when the awards were adjusted for inflation there was "virtually no change in the size of verdicts."[35] Finally, the data showed that "[a]lthough the ratio of compensatory to punitive damages was admittedly higher in a small number of awards, the pattern was that punitives are proportionate to actual damages."[36]

Eisenberg et al. analyzed a nationwide sample of punitive damage awards plus samples of cases from Illinois and California. Those authors found a strong and statistically significant correlation between compensatory damages and punitive awards.[37] Similar correlations were found in the GAO study,[38] the RAND study,[39] and other studies.[40] Additionally, Eisenberg et al. found no evidence

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[33] Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Emprical Data*, 78 Iowa L. Rev. 1, 50 (1992).

[34] *Id.* at 1, 51.

[35] *Id.* at 49.

[36] *Id.* at 51.

[37] Eisenberg et al., *Predictability*, *supra* note 15, at 637–39, 647–52.

[38] U.S. General Accounting Office, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90 (Sept. 1989).

[39] Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. Legal Stud. 283, 300 n.52 (1997).

[40] Jonathan M. Karpoff & John R. Lott, *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & Econ. 527, 543 (1999).

that punitive awards are more likely when individuals sue businesses than when individuals sue individuals.[41]

Eisenberg, Hans and Wells further investigated the relationship between punitive and compensatory damages in their combined data sets involving the Bureau of Justice Statistics data for 1992, 1995 and 2001, the data on large awards collected by Hersch and Viscusi, and the data on large awards collected by the *National Law Journal*.[42] The data showed that large punitive awards are almost never given in cases with small compensatory awards. Further, the analyses demonstrated a strong, significant positive correlation between punitive and compensatory awards.

E. "Blockbuster" Cases: Punitive Damages Also Correlate with Compensatory Damages.

While essentially conceding that, overall, punitive damages positively correlate with compensatory damages, a study by Hersch and Viscusi examined cases with punitive awards equaling or exceeding $100 million ("blockbuster awards") and claimed to have found that "blockbuster awards are not correlated with compensatory damage awards."[43]

Eisenberg and Wells challenged the Hersh and Viscusi conclusions by drawing attention to major flaws in their

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[41] Eisenberg *supra* note 37, at 639–40, 646.

[42] Eisenberg et al. 2007, *supra* note 16.

[43] Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. Legal Stud. 1, 2, 34 (2004).

statistical methodology.[44] Using correct methodologies and appropriate statistical analyses, Eisenberg and Wells recalculated the data involving every known punitive award equal to or in excess of $100 million occurring between 1985 and 2003. They found a strong, statistically significant relationship between punitive and compensatory awards: the larger the punitive award, the larger the compensatory award. Eisenberg and Wells thus demonstrated that, contrary to the Hersch and Viscusi conclusion, "Blockbuster punitive awards, like other punitive awards, show a strong association with compensatory awards."[45]

The subsequent Eisenberg, Hans and Wells study also concluded that there was no evidence showing an increase over time in so-called blockbuster awards.[46]

In short, there is a positive, statistically reliable relationship between compensatory and punitive awards for cases involving very large punitive awards as well as the overwhelming bulk of cases with more modest verdicts.

F. Juries and Judges Use Similar Criteria in Deciding Punitive Damages.

One way to assess the responsibility and fairness of the punitive damage awards of juries is to compare jury awards to awards made by judges when cases are tried in

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[44] Theodore Eisenberg & Martin Wells, *The Significant Association between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. Empirical Legal Stud. 175, 177–78 (2006).

[45] *Id.* at 194.

[46] Eisenberg et al. 2007, *supra* note 16.

bench trials. A recent study by Eisenberg et al. has done just that.[47] Drawing upon the data collected by the Bureau of Justice Statistics in 1992, 1995 and 2001 Eisenberg et al. compared awards made by juries with awards made by judges.[48] There were 11,610 cases in the total sample and punitive awards were made in 539 cases with non-zero compensatory awards, 438 (81.3 percent) made by juries and 101 (18.7 percent) made by judges.[49] The researchers examined (a) the relationship between compensatory damages and punitive damages and (b) the rates at which judges versus juries awarded damages. There is, of course, a problem of case selection: judges and juries hear different types of cases. However, to the extent possible, these differences were taken into account in the analyses.

Statistical regression analyses indicated that juries and judges awarded about the same amount of punitive damages per dollar of compensatory damages. Eisenberg et al. concluded that there was "no substantial evidence that judges and juries behave differently in any meaningful and systematic manner."[50]

Eaton et al. studied over 25,000 civil cases filed in state and superior courts in Georgia.[51] They concluded that

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[47] Theodore Eisenberg et al., *Judges, Juries and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. Empirical Legal Stud. 263, 267 (2006).

[48] *Id.*

[49] *Id.* at 268.

[50] *Id.* at 265.

[51] Thomas Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Studies 343, 344 (2005).

"[a]fter controlling for other factors, juries in Georgia are not more likely than judges to award punitive damages."[52]

A study by Robbennolt complements the Eisenberg and Eaton et al. findings while avoiding the problem of juries and judges deciding different cases.[53] Robbennolt asked eighty-seven federal and state trial court judges and 140 jury-eligible citizens to respond to a description of a lawsuit, which involved an injury resulting from an HMO policy prescribing a particular medication despite an internal memo indicating potential side effects. The outcome was described as either moderate or severe; the wealth of the HMO was also varied. Each participant was provided with one version of the incident and asked to recommend compensatory and punitive damages. Robbennolt found that the decision making of judges and citizens with regard to punitive damage awards was quite similar. The severity of the plaintiff's injury influenced compensatory awards, but both actual and potential injury combined to influence punitive damage awards among both judges and juries.[54] When the defendant's actions were perceived to be more offensive jurors and judges tended to award more punitive damages. Robbennolt concluded that the recommended punitive damages of juries and judges "were influenced by the same factors and were of similar magnitude."[55]

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[52] *Id.* at 364.

[53] Jennifer Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 Law & Hum. Behav. 315 (2002).

[54] *Id.* at 320–33.

[55] *Id.* at 336.

In short, the decision-making of juries in awarding punitive damages was found to be similar to the decision-making of trial judges.

G. Other Research Supports and Complements the Findings Cited Above.

Experimental studies on punitive damages have found that the severity of the injury caused to the plaintiff, or the potential harm that the defendant's actions may have caused or the reprehensibility of the defendant's behavior influenced punitive awards.[56]

Greene and her colleagues studied the decisions of jury-eligible citizens and students in a series of experiments that used case scenarios involving personal injury, products liability, insurance bad faith, automobile negligence and medical malpractice. The jurors tended to award greater damages when the defendants had acted in a reprehensible manner.[57]

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[56] For a general review of these studies, see generally Jennifer Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 Buffalo L. Rev. 103 (2002) and Edith Greene & Brian Bornstein, *Determining Damages: The Psychology of Jury Awards* (2003). An experiment by Corrine Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law & Hum. Behav. 189, 201–02 (1996), did not find an effect of severity on punitive damage awards, but the result may have been due to problems in the case materials presented to the participants.

[57] Corrine Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law & Hum. Behav. 189, 201 (2005); Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 Law & Hum. Behav. 187, 196 (2000); Edith Greene et al., *The Effects of Defendant Conduct on Jury Damage Awards*, 86 J. Applied. Psychol.

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Kahneman et al. asked citizens to evaluate a series of personal injury claims and rate the outrageousness of the conduct, the appropriate level of punishment or to make a punitive damage award. Larger punitive damages were awarded when the injury was rated as more severe.[58]

Horowitz and Bordens conducted a complex simulation experiment, finding that the earlier the defendants should have been aware of the harmful effects, the greater the award.[59] In another experiment, those authors found that the amounts of the punitive award increased when the potential plaintiff population involved hundreds of potential victims.[60]

Some studies have found that the wealth of the defendant is correlated with the size of the punitive award.[61] This should not be surprising, nor inappropriate. In 1869, the Maine Supreme Judicial Court in *Goddard v.*

228, 235–36 (2001); Edith Greene et al., *The Effects of Limiting Punitive Damage Awards*, 25 Law & Hum. Behav. 217, 225 (2001). *See generally* Edith Greene & Brian Bornstein, *Determining Damages: The Psychology of Jury Awards* 134 (2003) (describing the relationship between defendant's conduct and the size of punitive awards).

[58] Daniel Kahneman, David Schkade & Cass Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. Risk & Uncertainty 49, 62–64 (1998).

[59] Irwin Horowitz & Kenneth Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 Law & Hum. Behav. 269, 281 (1990).

[60] Irwin Horowitz & Kenneth Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Jury Decisions*, 12 Law & Hum. Behav. 209, 225–27 (1988).

[61] *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15, 42–48 (1998) ("Punitive damages are based on the wealth of the defendant in the vast majority of states. . . .").

Grand Trunk Railway[62] concluded that large punitive damages against a corporation served an "impressive lesson."[63]

Despite the obvious logic of making the wealthy pay more to achieve commensurate punishment, research indicates that jurors take defendant wealth into account in a responsible way rather than in the irresponsible way that critics of juries often attribute to them.[64] Hans conducted systematic, in-depth interviews with jurors who had recently decided cases involving business corporation defendants and rendered punitive awards.[65] The interviews revealed that juries took the wealth of the corporation into account, but they did not do so casually. Jurors viewed larger corporations as capable of paying more than smaller corporations, but at the same time did not want to excessively harm them financially. Hans concluded that "[j]urors' remarks reflect concern about emptying a corporate defendant's pockets, ruining a business through high awards. Other comments indicate that jurors in punitive damage cases consider the deterrent impact of an award."[66]

The desire to punish reprehensible behavior commensurate with harm or potential harm appears to be the primary, indeed, the controlling motive, behind jury awards of punitive damages.

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[62] *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202 (1869).

[63] *Id.* at 228.

[64] Some of these claims are reviewed in Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* 196–97 (2000).

[65] *Id.* at 196–98.

[66] *Id.* at 197–98.

H. Reprehensible Behavior Evokes Strong Societal Condemnation.

The fact that punitive damages are most likely to be awarded in cases involving intentional torts and fraud, especially when the harm or potential harm is very serious or the defendant's behavior is judged as reprehensible, should not be surprising. In 1893, Emile Durkheim, one of the fathers of modern sociology, observed that harms to an individual victim evoked strong reactions in communities because they violate widely shared societal norms about behavior, thus making everyone a victim.[67] Galanter and Luban have argued that punitive damages primarily serve to emphasize the norms and important values implicit in laws proscribing fraud or other reprehensible behavior.[68] Sebok has shown that in the nineteenth-century the primary function of punitive damages was for punishment and vindication.[69]

Robbennolt, Darley, and MacCoun also drew attention to the retributive role that punitive damages play in restoring the values implicit in laws proscribing intentional civil misconduct.[70] Sunstein noted that laws have

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[67] Emile Durkheim, *The Division of Labor in Society* (1893). *See also* Kai Erikson, *Wayward Puritans: A Study of the Sociology of Deviance* (1966) (studying the functional role of social deviance in seventeenth-century Massachusetts); Neil Vidmar, *Retribution and Revenge, in Handbook of Justice Research in Law* 31 (Joseph Sanders & V. Lee Hamilton eds., 2001).

[68] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1396 (1993).

[69] Anthony Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi-Kent L. Rev. 163, 205 (2003).

[70] Jennifer Robbennolt, John Darley, & Robert MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as*

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"expressive" functions that incorporate important social values.[71]

An experiment by Anderson and MacCoun presented simulating jurors with personal injury cases and the option of awarding the punitive damages to the individual plaintiff or to the state. Contrary to many people's intuitions, the jurors were more likely to award the damages to the plaintiffs rather than the state, causing the authors to conclude that punitive damages serve a restorative function, advancing the breach caused by the defendant's reprehensible actions.[72]

I. Exxon-Funded Research Does Not Provide Credible Grounds For Concluding That Juries Are Incompetent.

A series of jury simulation studies funded by the Exxon Corporation in the wake of the punitive award

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Goal Managers, 68 Brook. L. Rev. 1121, 1142–44 (2003). Although arguing for treating punitive damages as a form of compensatory damages, Sharkey's concept of punitive damages as "societal damages," Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 393–99 (2003), has drawn attention to the fact that in many punitive damages cases the harm is not just to the individual plaintiff or plaintiffs in a law suit but also to persons who were harmed but were not part of the lawsuit ("absent plaintiffs") but others who could potentially be harmed as a result of the violations of the law ("quasi-plaintiffs"). *Id.*

[71] Cass Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024–25 (1996).

[72] Michelle Anderson & Robert MacCoun, *Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 Law & Hum. Behav. 313, 327–28 (1999).

rendered for the Exxon Valdez Alaska oil spill,[73] and eventually compiled in a book,[74] led the authors to assert that jury decision-making with regard to punitive damages was unreliable, erratic and unpredictable.[75]

The broad conclusions of the Exxon-funded researchers have been severely critiqued in a number of articles by scholars who had no connection to the research.[76] *Punitive*

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[73] Elizabeth Amon, *Exxon Bankrolls Critics of Punitives, Then It Cites the Research in Appeal of $5.3 Billion Valdez Award*, National Law Journal, May 17, 1999, at A1; Alan Zarembo, *Funding Studies to Suit the Need; In the 1990s, Exxon Began Paying for Research into Juries and the Damages They award; The Findings Have Served the Firm Well in Court*, Los Angeles Times, Dec. 3, 2003, at A1; William R. Freudenburg, Paper Abstract, *The Intersection of Corporate Cash, Science and the Law: Toward a Closer Examination*, Session on Law and Society: Legal Institutions and Processes, Annual Meeting of the American Sociological Association, Aug. 16, 2003.

[74] Cass Sunstein et al., *Punitive Damages: How Juries Decide* (2002).

[75] *Id.* at 241.

[76] *See* Neal Feigenson, *Can Tort Juries Punish Competently?*, 78 Chi.-Kent L. Rev. 101, 242 (2002) ("[T]he data do not support the author's critical view of punitive damages. . . ."); Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without A Solution*, 52 Stan. L. Rev. 1809, 1817 (2000) ("The supporting argument and evidence [for abolishing punitive damages in product liability] are . . . far from compelling."); Richard Lempert, *Juries, Hindsight Bias, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DePaul L. Rev. 867, 870, 877 (1999) ("The [Exxon-funded] authors . . . do not make an adequate social science case for . . . change, and their recommendation that this should be done deserves no weight in any policy arena."); Robert MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 Stan. L. Rev. 1821, 1827 (2000) ("Viscusi's data on their own are clearly too modest to support his sweeping call to either remove punitive damages judgments from the jury or eliminate punitive damages altogether."); Catherine Sharkey, Book Review, *Punitive Damages: Should Jurors Decide?*, 82 Tex. L. Rev. 382, 385 (2003) ("A fuller examination of Sunstein et al.'s empirical work reveals the

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Damages essentially ignored or misstated real world findings that contradicted or were inconsistent with their own experimental findings, used experimental materials that were biased or required participants to make legal versus fact decisions and failed to adequately recognize the limitations of the experiments.

Although some of the experiments from *Punitive Damages* yield interesting and useful insights about juror decision-making, the studies do not provide a sufficient basis to make broad claims that juries are incompetent or erratic in awarding punitive damages.

II. Judges Adequately Exercise Oversight Of Punitive Jury Awards and Post-Verdict Settlements Often Reduce Awards.

As noted earlier, one of the arguments against punitive damages is that trial courts are not using their powers to supervise jury verdicts. While there are instances in which juries arguably render verdicts that are excessive,

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indeterminacy—and possible inapplicability—of that research with respect to broader nonretributive theories of punitive damages. What this reveals, more generally, is the contingent nature of Sunstein et al.'s conclusions, and the implicit, and perhaps erroneous, assumptions that underlie their policy prescriptions."); Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s Punitive Damages*, 53 Emory L.J. 1359, 1403 (2004) ("[I]t is abundantly clear that *Punitive Damages* should not be treated as empirical authority for individual cases or for tort reform generally.") Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages*, 23 Law & Hum. Behav. 705, 712 (1999) ("I am disturbed by the article, not only because of the legal errors, misstatements, and unsupported assertions that it contains, but by the authors' attempt to draw largely unqualified policy implications.").

research shows that judges frequently exercise *remittitur* or reverse verdicts.

Rustad has pointed out that individual states provide methods for reviewing the excessiveness of punitive damage awards.[77] These standards include "passion or prejudice" and "shock the conscience" tests.[78]

The General Accounting Office study of product liability cases rendered between 1983 and 1985 in five states found post-trial reductions in eighty-two percent of punitive damages verdicts.[79]

A RAND study of awards in Cook County, Illinois and San Francisco, California concluded that for awards amounting to $1 million or more, reductions amounted to almost forty percent.[80]

Landes and Posner found that federal appellate courts reversed or remanded the majority of punitive awards, and in state trials, punitive damages were of "relative insignificance" in the area of products liability.

Viscusi reached a similar conclusion about products liability cases, finding that only twenty-nine percent of the

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[77] Michael Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 Loy. La. L. Rev. 1297, 1329–34 (2005).

[78] *Id.*

[79] U.S. General Accounting Office, Report to the Chair, Subcommittee on Commerce, Consumer Protection and Competitiveness, Committee on Energy and Commerce, House of Representatives, *Product Liability: Verdicts and Case Resolution in Five States*, GAO/HRD-89-99, at 42 (1989).

[80] Michael Shanley & Mark Peterson, *Posttrial Adjustments to Jury Awards* 29 (1987).

punitive award was paid.[81] Of particular note, the "block-buster" punitive awards studied by Hersch and Viscusi are regularly reduced.[82]

Empirical research further indicates that the damage awards are also reduced in post-verdict settlements without the need for judicial intervention.

Rustad examined the post-trial outcomes of punitive damages verdicts rendered between 1965 through 1990.[83] Almost forty percent of the cases were settled between the parties. Thirty-two percent were reduced or reversed by the trial judge or an appellate court. Twenty-five percent of cases were affirmed upon appeal.[84] No punitive damages

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[81] W. Kip Viscusi, *Reforming Products Liability* 94 (1991).

[82] *E.g.*, *IGEN Intern., Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003) (reducing award of about $505 million by over 90 percent); *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247 (5th Cir. 1999) (Jury awarded in excess of $150 million in compensatory, consequential, and punitive damages; punitive award struck on appeal.); *Pioneer Commercial Funding Corp. v. American Financial Mortg. Corp.*, 855 A.2d 818 (Pa. 2004) (striking large jury award); *COC Services, Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654 (Tex. App. 2004) (striking large punitive damages award); *Amoco Chemical Co. v. Certain Underwriter's at Lloyd's of London*, 1996 WL 407855 (Cal. App.) (reversing large jury award). In *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F.Supp. 535 (S.D. Texas 1997), a jury awarded $220,720,000 in compensatory and punitive damages. A retrial was ordered based on plaintiff discovery abuse, *see* Felicity Barringer, *Judge Says Record Libel Case Should Be Retried*, N.Y. Times, Apr. 9, 1999, at C1, and it is reported that MMAR eventually chose not to pursue the case, David McHam, *Law & the Media in Texas: Handbook for Journalists, available at* http://www.texaspress.com/Lawpress/LawMedia/Libel/TexasLibelCases.htm.

[83] Michael L. Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 54–59 (1992).

[84] *Id.* at 55.

were paid in forty-six percent of cases and some of the award was paid in fourteen percent of the cases. The full award was paid forty percent of the time.[85]

Rustad and Koenig found that in the relatively rare instances in which punitive damages were given in medical malpractice cases, in more than 40 percent of such cases the awards were reversed on appeal, settled or were not collectable due to defendant insolvency.[86]

Karpoff and Lott sampled almost two thousand cases involving claims for punitive damages that covered the broad spectrum from which punitive damage claims arise and found that post-verdict settlements were substantial.[87] The mean post-verdict punitive award settlement was never more than seventeen percent of the mean punitive award; in many types of cases punitive awards were never a factor in the settlements.[88]

Vidmar and Rose identified the twenty largest awards in their sample of Florida cases.[89] They concluded that at least half of the awards resulted either in no payment or a reduced payment.

In summary, there is very strong evidence of judicial supervision of punitive awards. Post-verdict settlement negotiations are another common mechanism through which punitive damages are adjusted downward or not paid at all.

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[85] *Id.* at 56.

[86] Rustad & Koenig, *Reconceptualizing*, *supra* note 15 at 1009–12.

[87] Karpoff & Lott, *supra* note 40, at 527–30.

[88] *Id.* at 537–38.

[89] Vidmar & Rose, *supra* note 15, at 506.

CONCLUSION

Critics of punitive damages assert that juries are irresponsible, incompetent and biased in awarding damages and imply that trial and appellate courts do not adequately supervise or control punitive awards. Hard empirical data say otherwise on both issues.

American juries render punitive damages competently and responsibly and in a manner similar to decisions of experienced trial judges. Moreover, the data indicate that jury verdicts are rendered in accord with this Court's concern in *State Farm* and earlier cases that the principal criterion for punitive damages should be the reprehensibility of the defendant's behavior. Solid and extensive empirical facts should always trump anecdotes and innuendo. The empirical facts indicate that there is no need for this Court to impose additional federal constitutional due process standards on state punitive damages laws.

For the following reasons, the *amici* request that the decision below be affirmed.

Respectfully submitted,

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APPENDIX

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Brian Bornstein is Professor of Psychology, University of Nebraska-Lincoln, and Courtesy Professor of Law, University of Nebraska-Lincoln, where he is Associate Director of the law-psychology program. He holds a Ph.D. in experimental psychology from the University of Pennsylvania (1991) and a Master of Legal Studies (MLS) from the University of Nebraska (2001). He has conducted and published research on juries in peer review journals and has received funding from the National Science Foundation for this research. He is co-author of the book *Determining Damages: The Psychology of Jury Awards* (2003) and has published more than 50 articles in social science

journals and law reviews (e.g., Law and Human Behavior; Behavioral Sciences & the Law; Law & Psychology Review; Psychology, Crime and Law; Journal of Medicine and Law; and Florida State University Law Review). He reviews research proposals for the National Science Foundation and numerous journals and is a current member of the Law & Human Behavior editorial board.

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Stephen Daniels is a Senior Research Fellow at the American Bar Foundation in Chicago, IL, and an Adjunct Professor of Political Science at Northwestern University. He holds a Ph.D. in political science from the University of Wisconsin-Madison. His research focuses on law and public policy and the various aspects of the American civil justice system. He has written on trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. He is co-author (with Joanne Martin) of *Civil Juries and the Politics of Reform* (Northwestern University Press, 1995), and author or co-author of numerous articles in law reviews (e.g., Texas Law Review; Minnesota Law Review; and Wisconsin Law Review) and social science journals (e.g., Law & Society Review; Law & Policy; and Justice System Journal) focusing on law and public policy. He reviews research

proposals for the National Science Foundation and manuscripts for peer reviewed journals in the law and society field and in political science. He is a current member of the editorial board for Justice System Journal, a peer-reviewed journal.

Thomas A. Eaton is the J. Alton Hosch Professor at the University of Georgia School of Law where he has taught for more than twenty years. He has published articles on his empirical research on punitive damages and tort litigation in the Georgia Law Review, the Yale Law and Policy Review, the Yale Journal on Regulation, and the Journal of Legal Studies.

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punitive damages, judge and jury trials, the death penalty, class actions, and litigation models.

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